United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1416

To be argued by
PETER M. BLOCH

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1416

B/S

UNITED STATES OF AMERICA,

Appellee,

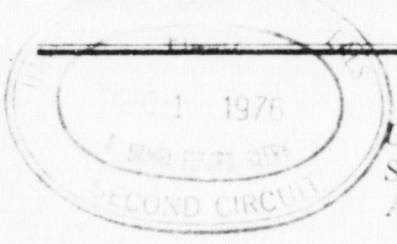
—v.—

WILFREDO PAGAN,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA



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Preliminary Statement

Wilfredo Pagan appeals from a judgment of conviction entered on September 8, 1976, in the United States District Court for the Southern District of New York, after a four day trial before the Honorable Thomas P. Griesa, United States District Judge and a jury.

Indictment 75 Cr. 638 filed in two counts on June 27, 1975, charged defendants Wilfredo Pagan, Carlos Lopera and Pedro Castro in Count One with conspiracy to possess and distribute cocaine in violation of Title 21, United States Code, Section 846, and charged Carlos Lopera and

Pedro Castro in Count Two with distribution of approximately 115 grams of cocaine on June 18, 1975.

Trial of Wilfredo Pagan commenced on March 25, 1976 and concluded on March 30, 1976, when the jury returned a verdict of Guilty on Count One, the only count in which Pagan was charged.* On June 11, 1976, Pagan was committed to the custody of the Attorney General for observation and study pursuant to 18 U.S.C. § 5010 (e). On September 8, 1976, Pagan was sentenced to two years imprisonment, the execution of which was suspended, and placed on probation for five years.

Statement of Facts

The Government's Case

The Government's proof at trial established that during late May and June of 1975, the defendant Pagan participated in a conspiracy to distribute large amounts of narcotics to undercover agents of the Drug Enforcement Administration (DEA). The conspirators actually sold an eighth of a kilogram of cocaine in anticipation of conducting multi-kilogram cocaine transactions. These transactions would have eventuated but for the fact that the identity of the DEA informant was discovered.

On May 25, 1976, in San Juan, Puerto Rico, an informant named Brenda Marchand introduced co-defendant Carlos Lopera to Special Agent Fortunato Jorge of the DEA, who was posing as Marchand's husband. Lopera, who claimed he was in Puerto Rico to receive

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* Defendant Castro pled guilty to Count One of the Indictment on February 4, 1976. Carlos Lopera is currently a fugitive.

fifteen kilograms of cocaine from Colombia, agreed to sell four kilograms thereof to Jorge. When this transaction failed to materialize, Lopera agreed to sell several kilograms of cocaine to Jorge in New York at a later time. (Tr. 80-82).*

On the weekend following the meeting between Jorge and Lopera, defendant Pagan was introduced to Marchand by co-defendant Pedro Castro in Puerto Rico. Pagan, a close friend of Lopera, indicated that he wanted to act as courier, transporting the cocaine from New York to Puerto Rico when the deal between Lopera and Jorge was consummated. At the end of the weekend, Pagan carried a card containing Marchand's telephone number to Lopera so that Lopera could contact her regarding the anticipated cocaine transaction. (Tr. 50-52). Pagan delivered the message but also retained Marchand's phone number himself and used it several times to call Marchand collect to inform her that Lopera would soon call about the cocaine transaction, and to ask that she include him in the transaction in order that Pagan could make some money. (Tr. 55-56, 361).

On June 10, 1976, Lopera called Marchand to tell her that he had obtained the cocaine, indicating that Pagan would be among the couriers to bring the cocaine to Puerto Rico from New York (Tr. 56-57). On June 11th, Agent Jorge called Lopera who agreed to sell Jorge six kilograms of cocaine in New York. (Tr. 83). During the next few days, Lopera repeatedly telephoned Jorge and urged him to come to New York to consummate the cocaine transaction. (Tr. 82-84).

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* "Tr." refers to the trial transcript; "GX" refers to Government Exhibit; "DX" refers to defense exhibit; "Br." refers to the appellant's brief.

Meanwhile, on June 3, 1976, Marchand had introduced Agent Jorge's partner, Special Agent Felix Jimenez, to Pedro Castro, who was an associate of Lopera. After some discussion the following day, Castro spoke by telephone with Lopera in New York and it was agreed that Jimenez would buy four kilograms of cocaine from Castro and Lopera. (Tr. 173-75).

On June 16, 1975, Agents Jorge and Jimenez met with Castro and Marchand in Puerto Rico, placed a telephone call to Lopera in New York, and confirmed the agreement to sell six kilograms of cocaine to Jorge and four kilograms to Jimenez. Lopera indicated he had sources of supply for a total of forty kilograms of cocaine. During the meetings that day, it was agreed that Castro would travel to New York, to be followed by Jorge, Jimenez, and Marchand, and that the transaction would be carried out in New York. (Tr. 61-63, 84-88, 175-77).

The following day, June 17th, 1976, Jorge, Jimenez, and Marchand flew to New York. On the morning of June 18th, they telephoned Lopera who indicated that he, Castro, and Pagan had been awaiting their arrival. (Tr. 63-64). Later that day, Lopera and Castro met Jimenez, Jorge and Marchand in the Regency Hotel in New York at which time Lopera indicated that in addition to his sources for the 40 kilograms, he had another source for seven kilograms of much purer cocaine. It was agreed that Jorge and Jimenez would buy the seven purer kilos rather than the previously agreed upon 10 kilograms, and that delivery would be made on June 19th. (Tr. 90-92, 182-83, 189-90).

The agents asked for a free sample of the cocaine but upon Lopera's refusal, agreed to buy an eighth kilogram sample for $4000. (Tr. 183, 92). After attempting to

pick up the eighth of a kilogram at a building on 46th Street, Jimenez and Lopera returned to the latter's apartment to wait while Lopera's source went to his "stash" in Yonkers to get the cocaine. (Tr. 184-85). Castro was at the apartment and was later joined by Pagan who was accompanied by a girl. After several telephone calls from the supplier to Lopera, Castro, Lopera, Jimenez, Pagan and the female got into a taxicab and returned to the vicinity of the building on 46th Street, Pagan and the woman exiting the taxi enroute. Lopera ultimately obtained the eighth of a kilogram of cocaine and gave it to Jimenez who handed him the $4000. (Tr. 185-89; GX 1). On the next day when the seven kilograms were to be delivered, there were numerous conversations between Lopera, the agents, and the informant during which it became apparent that the deal was to be postponed until the next day because Lopera's source felt some "heat." Pagan was a party to at least one of the calls from the source. (Tr. 73, 109).

On June 20th, Marchand and Jorge placed a telephone call to Lopera's apartment. Pagan answered the telephone and told Agent Jorge and Marchand that Lopera was in Yonkers getting the cocaine, that he would call upon his return, and that they should not worry because "everything was perfect." (Tr. 74, 102). Later that day, Lopera told Jimenez that the seven kilogram transaction could not take place at that time, but that he would supply an eighth of a kilogram of pure cocaine instead for $3800. (Tr. 194-96).

Agent Jimenez then went to Lopera's apartment and there met Lopera, Castro and Pagan. When Jimenez asked Lopera about the price of the cocaine, Lopera turned to Pagan and asked him how much Pagan's friend wanted for the cocaine. Pagan responded that the price was $3800 because it was pure Bolivian cocaine. (Tr.

196; DX C). Lopera then gave Jimenez a sample of the cocaine. Thereafter Pagan left the apartment to find out if his friend could deliver the cocaine to Jimenez' hotel, but was unable to locate him at that time. (Tr. 197-200; GX 2). Lopera then spoke with several unidentified persons on the telephone and subsequently announced that the seven kilogram deal was off because Pamela, the source of the cocaine, had learned from Marchand's ex-husband that Marchand was, in fact, a DEA informant. Agent Jimenez, then placed Lopera, Castro and Pagan under arrest. (Tr. 198-99).

The Government also proved that during February, 1974, Pagan sold cocaine to a police officer named Victor Valladares on two occasions in the vicinity of Miami, Florida. As in the present case, the proof showed that Pagan knowingly assisted larger narcotics traffickers in the distribution of cocaine. (Tr. 308-17).

The Defense Case

Pagan testified in his own behalf. Admitting his acquaintance with Castro, Lopera, and Marchand, Pagan denied engaging in any conversations with them concerning narcotics. In particular, Pagan claimed that on June 20th, he had been out on the fire escape of Lopera's apartment with two women having drinks and repotting plants; he claimed that he had not been present at any of the discussions between Lopera, Castro, and Jimenez concerning price, procurement and delivery of the cocaine. Aside from the obvious conflict between Pagan's testimony and that of Agent Jimenez, Pagan's story also conflicted with the testimony of Agents Gray and Pavichevich, who were on surveillance, and attested that there was no one on Lopera's fire escape during the time in question. (Tr. 200, 282-88, 299-301).

ARGUMENT

POINT I

The District Court Properly Admitted Evidence of Similar Acts by the Defendant in 1974 and Properly Instructed the Jury Thereon.

Pagan claims the District Court erred both in admitting proof of similar crimes by Pagan, namely evidence of two sales of cocaine by him to a Miami police officer in 1974, and in "failing to give a limiting instruction when it admitted" that evidence. (Br. 5). Since the similar act proof was properly admitted, the court gave adequate limiting instructions both at the time the proof came in and in its final charge despite the absence of a request by the defendant, and no exception was taken to these instructions, defendant's claims are frivolous.

Defendant does not seriously contend that admission of the similar act proof was reversible error, as it clearly was not. Proof of similar acts is admissible under Rule 404(b) of the Federal Rules of Evidence and the law of this Circuit except when offered solely to prove criminal character. *United States* v. *Viruet*, 539 F.2d 295 (2d Cir. 1976); *United States* v. *Torres*, 519 F.2d 723, 727 (2d Cir.), *cert. denied*, 423 U.S. 1019 (1975); *United States* v. *Gerry*, 515 F.2d 130, 140-41 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States* v. *Papadakis*, 510 F.2d 287, 294 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States* v. *Brettholz*, 485 F.2d 483, 487 (2d Cir. 1973), *cert. denied*, 415 U.S. 976 (1974); *United States* v. *Deaton*, 381 F.2d 114 (2d Cir. 1967); *United States* v. *Klein*, 340 F.2d 547, 549 (2d Cir.), *cert. denied*, 382 U.S. 850 (1965). Moreover, a trial court's decision admitting such evidence will be overturned only upon a

demonstration that it abused its discretion in so doing. *United States* v. *Araujo*, 539 F.2d 287 (2d Cir. 1976); *United States* v. *Dwyer*, 539 F.2d 924 (2d Cir. 1976); *United States* v. *Santiago*, 528 F.2d 1130, 1134-35 (2d Cir.), *cert. denied*, 44 U.S.L.W. 3659 (May 19, 1976); *United States* v. *Ravich*, 421 F.2d 1196, 1204-05 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970); *United States* v. *Leonard*, 524 F.2d 1076, 1092 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3624 (May 3, 1976). *United States* v. *Wright*, 466 F.2d 1256, 1258 (2d Cir. 1972), *cert. denied*, 410 U.S. 916 (1973); *United States* v. *Kaplan*, 416 F.2d 103 (2d Cir. 1969).

In the present case the principal issue at trial was whether Pagan was a knowing and intentional participant in the cocaine conspiracy proved at trial acting as a subordinate of Lopera and Castro or whether he was inadvertently present during these cocaine negotiations and transactions particularly on June 20, 1975.* The Government offered the Valladares testimony pertaining to Pagan's 1974 cocaine transactions to demonstrate the absence of inadvertence or mistake on Pagan's part and his guilty knowledge during the 1975 cocaine transactions charged in the indictment. After considering the briefs and arguments of counsel, the court admitted the evidence for those purposes, (Tr. 11-16) a decision well within the ambit of Rules 404(b) and 403 of the Federal Rules of Evidence and the law of this Circuit. *United States* v. *Torres*, *supra*; *United States* v. *Leonard*, *supra*;

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* The so-called "basic issue" (Br. 7) of whether Pagan was participating in a ripoff rather than a *bona fide* narcotics conspiracy was never mentioned or suggested in any manner at trial. Even were it, in fact, an issue, evidence that Pagan had previously sold cocaine would be admissible to prove intent, i.e., that a narcotics transaction and not a ripoff was contemplated and perpetrated by Pagan, Lopera and Castro.

United States v. *Drummond*, 511 F.2d 1049, 1055 (2d Cir.), *cert. denied*, 423 U.S. 844 (1975); *United States* v. *Wright*, *supra*; *United States* v. *Brettholz*, *supra*; *United States* v. *Klein*, *supra*. Indeed, so striking is the similarity of Pagan's role as a subordinate to larger distributors of cocaine in both the transactions in Florida in 1974 and in the narcotics transactions in the present case, and so close in time are the events, that the court could hardly have decided otherwise.

Defendant argues, however, that despite the fact that the jury was clearly instructed at the end of the case as to the limited purpose of the similar act proof,* his conviction must nevertheless be reversed because the trial judge inadequately charged the jury as to the limited purpose of the proof at the time it came in. This claim must be rejected for at least three reasons. First, defendant cites no case in which it has been held that a limiting instruction must be given at the time similar act proof is admitted in a case where the court fully and carefully instructs the jury on the use of such evidence in its final charge. In fact, in *United States* v. *Di Giovanni*, Dkt. No. 76-1097, slip op. 437 (2d Cir., Nov. 9, 1976) cited by and argued by counsel for defendant, as squarely considering this very issue, this Court rejected the argument that the District Court's charge at the end of the case was an insufficient limiting instruction.

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* Defendant is, of course, entitled to an instruction limiting the purpose for which the jury considers the similar act evidence, provided he makes a proper request therefor. *United States* v. *Gerry*, *supra*; *United States* v. *Papadakis*, *supra*; *United States* v. *Klein*, *supra*. In the present case, defendant concedes that the jury was given a thorough and fair charge at the close of the case which made the limited nature of the similar act proof perfectly clear (Tr. 448-49).

Second, Judge Griesa, without request from defense counsel, in fact, did caution the jury as to the very limited nature of the similar act proof at the time it was admitted, noting particularly that Pagan was not to be convicted on the basis of having committed a crime in 1974 and that the only bearing of the Valladares proof was on the state of mind of the defendant during the period of the conspiracy on trial.*

Finally, in order to receive any limiting instruction, even as part of the court's charge at the end of the trial, counsel must make a timely request for the limiting instruction or he will be deemed to have waived the right thereto. *United States* v. *Papadakis*, *supra*, 510 F.2d at 295. See *United States* v. *Bozza*, 365 F.2d 206, 214 (2d Cir. 1966); *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966). Here not only was no such request made at any time prior to or during the Valladares testimony but in addition, no exception of any kind was taken to the limiting instructions that were given. Accordingly, any possible claim as to the adequacy of the court's instructions was waived.

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* The Court stated:

"All this is in for is not to—because he [Pagan] is on trial for a crime in February, 1974, but simply if the Government wishes to show the commission of a crime at that time, in some bare details to see—it just is—if the jury believes this evidence, it bears, if at all, simply on the state of mind of the defendant as of the time of the crime charged here.

We're not trying a case about 1974, so cut this short, please." (Tr. 315-16).

POINT II

The Evidence Was Sufficient for the Jury to Find That Pagan Participated in a Narcotics Conspiracy and Not a "Ripoff".

Appellant argues, in an obvious afterthought, that the evidence at trial demonstrated that Pagan participated in a ripoff and not a narcotics transaction. This argument was never suggested in the slightest way at any time in the trial below and is utterly without merit, amounting, as it does, to little more than a challenge to the sufficiency of the Government's evidence as to the existence of the conspiracy and Pagan's participation therein.

The evidence at trial, as noted, showed that Lopera and Castro had agreed to supply the agents with multi-kilogram quantities of cocaine. Pagan carried a message to Lopera to facilitate the negotiations and agreed to act as a courier to bring the cocaine from New York to Puerto Rico.* Furthermore, on June 20th Pagan informed Agent Jorge and Brenda that Lopera was in Yonkers picking up the cocaine and would call them as soon as he returned. Pagan assured them the transaction would not fall through

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* Even assuming, as defendant does, (Br. 9) that the ultimate amount of cocaine sold was too little to require the use of a courier in transporting it to Puerto Rico, that assumption in no way negates the conclusion that Pagan had agreed to be a courier and was a part of the conspiracy to deliver cocaine. It is elementary that a conspiracy can exist and a conviction be sustained even if the conspiracy is entirely unsuccessful in achieving its purposes, *United States* v. *Rabinowich*, 238 U.S. 78, 86 (1915); *United States* v. *Torres*, 503 F.2d 1120, 1124 n.2 (2d Cir. 1974). Nevertheless in this case the narcotics conspiracy was at least partially successful in that an eighth of a kilogram of cocaine was actually sold to the agents for $4,000.

and cajoled the agents not to return to Puerto Rico. That the Yonkers source was not a fiction devised as part of a ripoff scheme is shown by the fact that Lopera had to wait several hours on June 18th for the cocaine sample to arrive from Yonkers.* Further that the agreement to sell cocaine was a genuine narcotics transaction is most clearly indicated by the fact that an eighth kilogram sample was actually sold to the DEA agents for $4,000.

The events at Lopera's apartment on June 20th make Pagan's involvement in a *bona fide* narcotics conspiracy crystal clear. At the apartment it was Pagan who knew the price of the pure Bolivian cocaine to be sold to Jimenez, a sample of which Lopera actually gave to Jimenez.** In addition, Pagan actually attempted to procure the cocaine from his friend but was unable to do so.

When the seven kilogram transaction was finally called off, it was not done to facilitate a ripoff. The testimony is clear and the jury could find that the reason the transaction failed to materialize was because a real source, Pamela, (and not an imaginary one), had discovered from the informant's ex-husband, one Victor Ramirez, that Marchand might be a DEA informant, (Tr. 198-99), and therefore refused to complete the transac-

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* On June 19, 1976 there were frequent communications between the co-conspirators and their source including at least one telephone call to which Pagan was a party.

** Thus in the present case, unlike in *United States* v. *Bertolotti*, 529 F.2d 149 (2d Cir. 1975), the only case cited by defendant in support of his new theory of the case, narcotics actually changed hands twice. Further, *Bertolotti* did not involve an agreement to sell narcotics which was aborted because of fear of apprehension but rather the events in *Bertolotti* alluded to by defendant comprised a series of out and out robberies.

tion. It was for the same reason that Lopera refused to go to Jimenez' hotel alone after the June 20th negotiations at Lopera's apartment.*

This series of events reveals the absurdity of defendant's argument. It would be an irrational ripoff scheme indeed in which the participants would carry out an actual cocaine transaction for $4,000 and then bypass an opportunity to ripoff the monetary equivalent of several kilograms of cocaine ($26,000 to $28,000 per kilogram, Tr. 94) all to set up an ultimate theft of just $3800.

Finally, the jury could infer from the defendant's own false exculpatory testimony in the grand jury and at trial, particularly his false explanation indicating that he was on the fire escape during the negotiations for $3800 worth of pure Bolivian cocaine, that Pagan was guilty of the narcotics conspiracy as charged. *United States* v. *Mariani*, 539 F.2d 915, 920 (2d Cir. 1976); *United States* v. *Singleton*, 532 F.2d 199, 203-204 (2d Cir. 1976); *United States* v. *Pui Kan Lam*, 483 F.2d 1202, 1208 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974); *United States* v. *Arcuri*, 405 F.2d 691, 695 (2d Cir. 1968), *cert. denied*, 395 U.S. 913 (1969). Indeed this Court has recently noted that frequent association with co-conspirators coupled with a false exculpatory statement is sufficient to support a conviction. *United States* v. *Gentile*, 530 F.2d 461, 464-65 (2d Cir.), *cert. denied*, 44 U.S.L.W. 3719 (June 14, 1976). It is

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* That the transaction would be called off because Marchand's true identity was discovered by Lopera's source had been foreshadowed during the June 19th conversations. At that time Lopera postponed the sale of seven kilograms because the source of supply was feeling some "heat."

** As noted in Point I, *supra*, the fact that Pagan participated in a *bona fide* cocaine transaction in 1974 is additional reason for believing that the 1974 transactions were for the purpose of actually dealing in cocaine rather than stealing money.

particularly important to note that the defendant in his testimony never claimed that he was involved in a ripoff but rather claimed that he was not involved with Lopera and Castro in a transaction of any kind.

Accordingly, Pagan's newly conceived claim that the evidence demonstrated a ripoff rather than a narcotics conspiracy is frivolous.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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Form 280 A.- Affidavit of Service by Mail

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss.:

PETER M. BLOCH being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 1st day of December , 19 76 he served ~~a copy~~ 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

DONALD E. NAWI, ESQ.
2 Park Avenue
New York, New York 10016

And deponent further says that he sealed the said envelope and placed the same in the mail for mailing in the United States Attorney's Office, One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Peter M. Bloch

Sworn to before me this

1st day of December ,1976.

Alma Hanson

ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24-6763450 Qualified in Kings Co.
Commission Expires March 30, 1978